MUTUAL WAY DEVELOPMENT & CONSTRUCTION SDN BHD

v.

SAISEKI (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
ABDULL HAMID EMBONG JCA
HASAN LAH JCA
[CIVIL APPEAL NO: W-02-1001-2005]
18 DECEMBER 2007

EVIDENCE: *Fresh or further evidence - Application to adduce - When such evidence admissible - Conditions to be satisfied - Exercise of discretion - Function of appellate court*

CIVIL PROCEDURE: *Appeal - Fresh evidence - Application to adduce - When such evidence admissible - Conditions to be satisfied - Exercise of discretion - Function of appellate court*

The appellant/defendant, a quarry operator, had entered into a contract to purchase from the respondent/plaintiff a "Kobe 6-45 Hydro cone crusher" described as an "unused Kobe crusher". A dispute arose as to the crusher's outstanding payment and the plaintiff succeeded in its claim for the balance purchase price in the High Court. One of the issues that was determined by the trial court was whether the crusher was used or unused, which the trial judge found in favour of the plaintiff *ie*, that it was unused. The defendant filed an appeal against that decision and, subsequently, filed this motion for leave to adduce new evidence showing that the crusher was not an unused machine.

Held (dismissing the application)
Per Abdull Hamid Embong JCA delivering the jugdment of the court:

(1) To accede to this application at this stage, against the factual background of this case, would not only be an improper exercise of the court's discretion but tantamount to an abuse of its process. It would be equivalent to reopening this case on a piece of evidence that could have been made available with reasonable diligence on the part of the defendant. The new evidence too, at first glance, seemed not to be inherently probable or credible and, thus, could not with certainty be

said to meet the requirement of having a determining influence on the outcome of the case. How was it that after a period of 12 long years – during which the evidence was not available – did the evidence suddenly surface in a mere five-month period after the judgment of the High Court? Since judgment had been given, reopening this case would not be in the interest of justice. The balance of the purchase price of the crusher claimed by the plaintiff was only RM69,500, and it would be highly unfair to the plaintiff if it were to be confronted with this new evidence for the first time at this stage. Also, taking into account the time and cost factors if this case were reopened, this claim would lose any semblance of proportionality. The defendant had not shown that there were exceptional circumstances for an exercise of this court's discretion in its favour. This case was over and the claim was resolved. No more expenditure of time and money should be allowed. This court's appellate function is to review the evidence adduced at the trial, not to hear a partial retrial with fresh evidence added. *Chong Joon Wah v. Tan Lye Thiang* (foll); *Mulholland v. Mitchell* (foll). (paras 22, 23, 24, 25 & 26)

Bahasa Malaysia *Translation Of Headnotes*

Perayu/defendan, yang mengusaha sebuah kuari, telah memeterai perjanjian untuk membeli satu "Kobe 6-45 Hydro cone crusher" yang diperihalkan sebagai "Kobe crusher belum digunakan" daripada responden/plaintif. Pertikaian berbangkit mengenai pembayaran crusher yang masih tertunggak, di mana plaintif berjaya dalam tuntutannya di Mahkamah Tinggi untuk baki harga belian. Salah satu isu yang diputuskan oleh hakim bicara adalah sama ada crusher telah digunakan atau belum digunakan, di mana hakim bicara telah memutus dengan berpihak kepada plaintif, iaitu, bahawa ia masih belum digunakan. Defendan merayu terhadap keputusan, dan berikutnya, memfail usul di sini untuk kebenaran mengemukakan keterangan baru yang menunjukkan bahawa crusher bukanlah mesen yang belum digunakan.

Diputuskan (menolak permohonan)
Oleh Abdull Hamid Embong HMR menyampaikan penghakiman mahkamah:

(1) Untuk membenarkan permohonan di peringkat ini, berdasarkan latarbelakng kes ini, bukan sahaja suatu pelaksanaan budibicara mahkamah yang tidak teratur tetapi akan menjadi satu salah guna proses. Ia samalah dengan membuka semula kes ini atas

secebis keterangan yang boleh didapati melalui usaha yang munasabah di pihak defendan. Keterangan baru juga, pada pandangan mata kasar, kelihatan kurang menyakinkan, dan kerana itu, tidak dapat dipastikan memenuhi syarat mempunyai pengaruh yang kuat terhadap keputusan kes. Bagaimana mungkin, selepas 12 tahun berlalu – di mana keterangan tidak dapat diperolehi – ia secara tiba-tiba muncul dalam tempoh lima bulan selepas keputusan Mahkamah Tinggi? Oleh kerana penghakiman telahpun dibuat, membuka semula kes bukanlah untuk kepentingan keadilan. Baki harga belian crusher yang dituntut oleh plaintif hanyalah RM69,500, dan adalah amat tidak adil kepada plaintif jika ia harus pula dibebankan dengan keterangan baru buat pertama kali pada peringkat ini. Juga, mengambilkira masa dan faktor kos jika kes ini dibuka semula, tuntutan ini adalah tidak berbaloi sama sekali. Defendan gagal membuktikan bahawa terdapat halkeadaan-halkeadaan istimewa bagi mahkamah ini melaksanakan budibicara di pihaknya. Kes ini sudah pun selesai dan tuntutan juga sudah dilupuskan. Maka itu tiada lagi pembiayaan masa dan wang harus dibenarkan. Fungsi rayuan mahkamah ini adalah untuk menyemak keterangan yang dikemukakan di perbicaraan, bukan untuk mendengar se bahagian pendengaran semula dengan tambahan keterangan baru. *Chong Joon Wah v. Tan Lye Thiang* (diikuti); *Mulholland v. Mitchell* (diikuti).

Case(s) referred to:
Chong Joon Wah v. Tan Lye Thiang [1991] 3 MLJ 353 ***(foll)***
Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 ***(refd)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Lau Foo Sun v. Government Of Malaysia [1970] 2 MLJ 70 ***(refd)***
Leng Lan v. SM Yusudian [1939] MLJ Rep 222 ***(refd)***
Maju Holdings Sdn Bhd v. Fortune Wealth (HK) Ltd & Other Appeals [2004] 4 CLJ 282 CA ***(refd)***
Mulholland v. Mitchell [1971] 1 All ER 314 ***(foll)***
Roe v. Robert Mcgregor And Sons Ltd [1968] 2 All ER 639 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69
Rules of the Court of Appeal 1994, O. 7(3), (3A)

For the appellant - Philip TN Koh (BH Yap, Yau Wai Keong & Chan Kok Keong with him); M/s Chan & Assoc
For the respondent - WV Lye (HL Yap with him); M/s Lye & Yap

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S4-22-213-1993]

Reported by Suresh Nathan

JUDGMENT

Abdull Hamid Embong JCA:

[1] The appellant (defendant in the High Court), a quarry operator, entered into a contract to purchase from the respondent (plaintiff below) a "Kobe 6-45 Hydro cone Crusher" describe as an "unused Kobe Crusher".

[2] Dispute arose as to the outstanding payment of the Crusher and the plaintiff succeeded in its claim for the balance purchase price in the High Court. The defendant had also counter claimed for rescission of the contract and for damages for reduction of output and repair costs.

[3] One of the issues that was determined by the trial court was whether the Crusher was used or unused. This the learned trial judge found in favour of the plaintiff ie, that it was unused.

[4] The defendant on 2 September 2005 filed an appeal against that decision made by the High Court on 25 August 2005.

[5] A notice of motion for leave to adduce new evidence was subsequently filed on 2 September 2005.

[6] We heard this application and unanimously dismissed it on 19 March 2007.

[7] The Law

This is set out under O. 7(3) and (3A) of the Rules of the Court of Appeal 1994 which read:

> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court.
>
> (3A) At the hearing of the appeal **further evidence shall not be admitted** unless the Court is satisfied that:
>
> (a) At the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) The new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate Court as the case may be. (emphasis emphasis)

Order 7(3) above is a replication of the law as found under s. 69 of the Courts of Judicature Act.

[8] Although appeals to this court is by way of rehearing and this court is vested with a discretionary power to admit fresh evidence, this, it must be reiterated, should only be allowed if this court is satisfied that there are special grounds for its admission. The opening words of O. 7(3A) as we had emphasised above, qualify the exercise of this discretion which in our view, is an exception to the general rule of non admission. In *Roe v. Robert Mcgregor And Sons Ltd* [1968] 2 All ER 639, Harman LJ puts it this way:

> The court has always held its face against new evidence and will only admit it in very exceptional circumstances.

[9] This must be the legal position since rehearing in the Court of Appeal does not mean that it rehears the witnesses. Nor is this court a "re-seeing court". It only reads the evidence and rehears the counsel. Thus, where there is a conflict of evidence this court will have special regard to the fact that the trial judge saw and heard the witnesses. (*Chow Yee Wah & Anor v. Choo Ah Pat* [Privy Council] [1978] 1 LNS 32).

[10] Thus, leave to adduce further evidence may only be allowed if the applicant satisfied the stringent conditions laid down in *Ladd v. Marshall* [1954] 3 All ER 745 as applied by the Federal Court here in *Lau Foo Sun v. Government Of Malaysia* [1970] 2 MLJ 70, where Suffian FJ said:

> (i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial,
>
> (ii) the evidence must be that, if given, it would probably have an important influence on the result of the case, although it need not be decisive, and
>
> (iii) the evidence must be apparently credible, although it need not be incontrovertible.

[11] These stringent conditions now codified under r. 7(3A) had long been the guiding principles of our courts in their reluctance to freely admit fresh evidence as can be discerned in the case of *Leng Lan v. S.M. Yusudian* [1939] MLJ Rep. 222, where Aitken J remarked that the "Courts are very unwilling to allow (a completed case) to be reopened for the purpose of hearing new evidence except for good and substantial cause".

[12] And of these conditions, in *Maju Holdings Sdn. Bhd. v. Fortune Wealth (H. K.) Ltd. & Other Appeals* [2004] 4 CLJ 282, this court had held that:

> There are three conditions which must be fulfilled by the Appellant in order for fresh evidence to be admissible at the appellate stage. They are cumulative and conjunctive and not disjunctive in that all the conditions must be fulfilled in order for the fresh evidence to be admissible at the hearing of the appeals in the Court of Appeal.

[13] The New Evidence

The defendant now wishes to show that:

(a) The Crusher was sold, installed and used by Okabe Gumi Co. Ltd since 1972 (based on letter dated 8 May 2006);

(b) Subsequently, it was sold, installed and used by Towa Kogya (based on investigation of Mr. Mori (see F, of LTH1).

In short, it was not an unused machine.

[14] It was submitted that the defendant had written to Kobe Steel Ltd., the manufacture of the Crusher since June 1993 for inquiry before filling its defence and counter claim but these enquiries were unsuccessful. The defendant claimed that it had exhausted all steps but was not able to contradict the plaintiff's evidence.

[15] The defendant further contended that it was only in January 2006 (after the High Court judgment against it) that previous information it had on the Crusher was found to be incorrect, and that no reasonable diligence could have obtained that information. It was also contended that the defendant had all along been misled by Kisco-Kobe International, a subsidiary of Kobe Steel Ltd, and as such it was not in a position then to rebut the evidence adduced by the plaintiff.

[16] The defendant submitted that it had taken all reasonable steps to obtain this so called fresh evidence but to no avail. It urged this court to exercise its discretion in its favour since this new evidence would have a definite determining influence on this case; and to deny its admission would be an affront to a sense of justice.

[17] The plaintiff submitted that this case had gone through an extensive pre-trial process and that at these case management levels the defendant ought to have taken the necessary steps to produce the new evidence, not now, after the plaintiff had obtained judgment. The purported new evidence were after all documents dating long before this judgment was entered.

[18] It was also submitted that had the defendant been truly diligent in getting up its defence in the 11 year period of 1993 to 2004, its solicitor could have made the necessary enquiries earlier and obtained the information which it now says it has. The source of this information, one Mr. Y. Tsutsui is a person known to the defendant. Why then was he contacted only in 2006, after the judgment was given to the plaintiff?

[19] The learned trial judge had made a decision based on the evidence adduced and had found that the Crusher was unused. The defendant did not see it fit to call any expert witness to testify as to the condition of the Crusher at the material time. As such the defendant had failed the reasonable diligence test set out in the *Lau Foo Sun* case.

[20] Next the plaintiff submitted that the purported new evidence is not apparently credible or reliable. The new evidence seemingly suggested that the same Crusher was sold to two different companies in two different places in the same year. There is thus the element of uncertainty in the defendant's assertion. The plaintiff contended that it is highly possible that the Crushers sold in Japan were unrelated to the Crusher in the present case. Such uncertain evidence should not therefore be now adduced.

[21] We agree with this position taken by the plaintiff.

[22] In our view, to accede to this application at this stage, against the factual background of this case, would not only be an improper exercise of the courts' discretion, but tantamount to an abuse of its process. It would be equivalent to reopening of this case on a piece of evidence which we feel could have been made available with reasonable diligence on the part of the defendant.

That new evidence too, at first glance, seems not to be inherently probable or credible and thus, cannot with certainty be said to meet the requirement of having a determining influence on the outcome of the case.

[23] The plaintiff had waited for 12 long years to see the outcome of this litigation. Why was it that after all these long years that evidence was not available, yet in a mere 5-month period after the judgment, it suddenly surfaced? Now that the High Court had given its judgment, to allow for this case to be reopened would not, in our view, be in the interest of justice.

The balance of the purchase price of the Crusher claimed by the plaintiff is only RM69,500. It would be highly unfair to the plaintiff if we were to allow it to be confronted with this new evidence for the first time at this stage. Also, taking into account the time and cost factors if this case is re-opened, we feel that this claim would lose any semblance of proportionality.

[24] The words of Yong Pung How CJ in *Chong Joon Wah v. Tan Lye Thiang* [1991] 3 MLJ 353 must serve as reminder on what we say above. We adopt what the learned Chief Justice said in this passage:

> It need hardly be said that there must be finality in litigation. Even apart from the principles laid down in *Ladd v. Marshall*, the costs of litigation require that some semblance of proportion must be maintained, and the Court of Appeal would be reluctant to order a new trial when the amount at stake is so small and the proceedings in court have already taken so long.

[25] In our view the defendant had not shown that there are exceptional circumstances for us to exercise our discretion in its favour. This case is over and the claim is resolved. No more expenditure of time and money should be allowed. This court's appellate function is to review the evidence adduced at the trial. It is not the normal function of the Court of Appeal to hear a partial retrial with fresh evidence added.

[26] We end by quoting these words of Lord Pearce in *Mulholland v. Mitchell* [1971] 1 All ER 314:

> It is in general undesirable to admit fresh evidence on appeal, because there ought to be finality in litigation.